No. 92-607

Supreme Court, U.S.
FILED
JAN 4 1993
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1992

ALBERT S. GOODNER, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

REPLY BRIEF OF PETITIONER, ALBERT S. GOODNER, JR.

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Petitioner, Albert S. Goodner, Jr., respectfully files this his Reply to the Brief For the United States in Opposition to Petitioner's request that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit, entered on June 4, 1992.

ARGUMENT

I.

PAINT WASTE IS A SPENT SOLVENT IF 2 + 2 = 5 (WITH APOLOGIES TO GEORGE ORWELL)[1]

Both in the trial court and on appeal the Environmental Protection Agency ("EPA") urged that the "paint waste" generated at Goodner Brothers Aircraft facility was hazardous because it *contained* a solvent. In its Brief in Opposition, the EPA not only discards its position in the trial court, but likewise chooses not to defend the crucial holding of the Eighth Circuit adopting EPA's position. Instead, EPA now argues for the first time that the "paint waste" – consisting of peeled paint, residues of the solvent used to soften the paint, and, occasionally, water – *is* a "spent" solvent – *i.e.* a solvent that can no longer be used. Brief in Opp. at 8. To repeat, EPA is not arguing, as it has before, and as the Eighth Circuit incorrectly believed, that the "paint waste" is hazardous because it *contained* a solvent. Rather, EPA baldly insists the "paint waste" is not "paint waste" but instead is "spent solvent." EPA's latest construct itself violates the rule of lenity, because it is at odds with the terms used to define an "F002" waste, is inconsistent with related regulatory provisions, and is, to put it plainly, nonsense.

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[1] EPA's argument as to the meaning of the "F002" designation evokes the following exchange in Orwell's novel *"1984"* between Winston and O'Brien, his interrogator:

"How can I help it?" he blubbered. " How can I help seeing what is in front of my eyes? Two and two are four."

"Sometimes, Winston. Sometimes they are five. Sometimes they are three. Sometimes they are all of them at once."

ORWELL, 1984, 254 (Harcourt, Brace & World, Inc. ed. 1949).

When EPA argues that the "paint waste" is a "spent solvent," it implicitly asserts that "paint waste" is described by the definition for the listed hazardous waste identified as "F002." That designation actually describes only two very specific wastes – "spent halogenated solvents," and "still bottoms from the recovery of these spent solvents." App. at 54. Nowhere does the definition of an "F002" waste mention, suggest, or remotely intimate that "paint waste" of the type generated at the Goodner Brothers Aircraft facility is included in the "F002" designation. *Id.* In fact, the inclusion of "still bottoms" in the definition of an "F002" waste underscores the fact that the phrase "spent solvents" describes a limited class of wastes. If the phrase "spent solvents" was intended to have as broad a meaning as EPA now suggests – that is, any substance or material bearing any trace or residue of a solvent – inclusion of still bottoms in the definition of "F002" wastes is redundant, for still bottoms necessarily contain solvent. EPA's position, then, must ultimately rest on the premise that the phrase "spent solvents" is a broadly generic description. Only then can it implicitly argue that "F002" wastes include "paint waste," because that waste certainly is not explicitly included. But to paraphrase *Krause*, unless EPA's latest understanding is "self-evident" from the terms used to define an "F002" waste – which it is not – Albert Goodner, Jr. cannot be criminally prosecuted for failing to divine that "spent solvents" included not-spent-solvents such as "paint waste."

Yet, the absence of any mention of "paint waste" in the definition of an "F002" waste is not surprising. The

two wastes are very different. EPA considers a "spent material" such as "spent solvents" as a substance that can be reprocessed into a usable product. *See,* 40 C.F.R. 261.1(c)(1). That definition is buttressed in the "F002" listing by the specific identification of still bottoms "from the recovery of the spent solvents" as a waste. App. at 54. By "spent," EPA obviously does not mean used up or consumed, but exhausted, where a material presents the appearance of the original product but is no longer functional. For the "F002" definition to be internally consistent, as well as consistent with the general definition of "spent" material, only those substances (i) with the appearance of a solvent and (ii) capable of reprocessing for use as a solvent, are described by the "F002" designation.

Here the waste generated – consisting of peeled paint, residues of the solvents used to soften the paint, and, occasionally, water – is a separate, identifiable, unitary waste generated as a result of paint stripping. The waste is not, as EPA incorrectly asserts, solvent that can no longer be used for its solvent properties. The waste does not look like a solvent.[2] The waste can *not* be reprocessed to produce usable solvent. The waste is not a "spent solvent." The waste is "paint waste."

EPA clearly understands the distinction. When the hazardous waste rules were first proposed, they identified "paint waste (such as used rags, slops, latex sludge,

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[2] Throughout its brief, EPA consciously and incorrectly describes the paint waste with words suggesting that waste is almost entirely liquid solvent. That picture is wrong. If the full record were available, EPA's misleading "spin" could be readily exposed.

spent solvent)" and "waste paint and varnish remover or stripper" as "listed" wastes, in addition to and separate from those wastes ultimately identified as "F002" wastes. 43 Fed. Reg. 58,946, 58,957 (Dec. 18, 1978). EPA later identified "paint residues or sludges generated from industrial painting in the mechanical or electrical products industry" as "listed" waste "F017," just as an "F002" waste was designated a "listed" waste. On January 16, 1981, the paint residue listing was "suspended temporarily." 46 Fed. Reg. 4617 (Jan. 16, 1981). The "temporary suspension" remains in effect, eleven years later. Having recognized a distinction between "paint waste" and "F002" waste, and acted upon it, EPA cannot now claim that "paint waste" was "plainly" included in the "F002" designation, at least not in a criminal prosecution.

Although it should not be necessary, EPA's latest position can easily be shown to produce nonsensical results. If EPA is right, rags used to wipe a stripped plane are not waste rags, they are "spent solvent" at least if *any* solvent is present on the rag. Sand or grit used to absorb solvent that may have fallen on the ground during the stripping process is not waste sand or grit, but spent solvent. In fact, if the wing of a plane being repainted is found to be defective and discarded after the paint is removed, and if the wing contains *any* amount of solvent, the wing is not a wing but spent solvent. The rule of lenity should prevent Albert Goodner, Jr., or one of his small business colleagues, from being criminally prosecuted for believing, in their naiveté, that waste rags are waste rags, waste sand or grit is waste sand or grit, and a discarded wing is a discarded wing.

Perhaps EPA could have defined all of the "wastes," just described, including "paint wastes," as "F002" wastes. Perhaps EPA could by rule mandate that 2 + 2 =5. (Many believe it has already done so on several occasions.) But to prosecute a citizen criminally for thinking that 2 + 2 = 4, EPA must spell out its contrary rule clearly and unambiguously. If there is any question about whether 2 + 2 = 5, the rule of lenity demands that 2 + 2 *not* equal 5. The "F002" listing does not clearly and unambiguously describe "paint waste." EPA's assertion otherwise is an incredibly desperate argument to avoid the rule of lenity and the teaching of *Krause*. Whatever the rule may be for regulation-drafting or civil enforcement proceedings, and no matter how inconvenient it may prove to an eager law enforcer; EPA cannot use *criminal* prosecutions to seek broad interpretations of narrowly drawn statutory or regulatory language.

II.

ARGUING AS EPA DOES THAT RAVINES AND PITS ARE BOTH A "FACILITY" AND THE "ENVIRONMENT" MAY BE ACCEPTABLE IN QUANTUM PHYSICS, BUT IT IS AN UNACCEPTABLE CONSTRUCTION OF A CRIMINAL STATUTE

Petitioner's position on appeal is that the ravines or pits are a "facility," as that term is defined in CERCLA, and because there was no evidence presented to the jury of a release from those "facilities" into the "environment," the CERCLA convictions must be set aside. The jury instructions included the correct definitions of "facility" and "environment." The jury could not, however, under the evidence before it, have concluded that there

was a failure to notify the EPA, because there was no evidence of a release from a "facility" (the ravines or pits) into the "environment."[3] At most there was proof of movement of material from one "facility" (the drums or truck) to another "facility" (the ravines or pits). The error was not with the instructions, but with the proof.

Not surprisingly, EPA urges that the ravines and pits were not a "facility" but "the environment." Amazingly, however, EPA concedes that "a pit [and logically then, a ravine] might in some circumstances serve as a facility." Brief in Opp. at 10. Apparently, EPA will get back to us later on when a ravine or a pit is a "facility" as opposed to the "environment." Such an approach to statutory construction, "maybe it is, maybe it isn't," may be acceptable in a civil context. It is totally inappropriate in a criminal setting. The rule of lenity mandates that if the ravines and pits could be considered a "facility" and such a construction prevents conviction, that is the construction the courts must follow. EPA cannot have it both ways in a criminal setting.

CONCLUSION

The Petition for a Writ of Certiorari should be granted, not only to set aside Mr. Goodner's convictions

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[3] EPA's burden to show a release is light, if a release in fact occurred. The agency simply made no effort to carry the burden in this case.

but to send a signal that the rule of lenity is alive and well in the prosecution of environmental crimes.

Respectfully submitted,

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